

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
August 17, 2012

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-11-9415; TCEQ Docket No.; 2011-2253-PWS-E
In Re: Old Tymer Enterprises, Inc.

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **Thursday, September 6, 2012**. Any replies to exceptions or briefs must be filed in the same manner no later than **Monday, September 17, 2012**.

This matter has been designated **TCEQ Docket No. 2011-2253-PWS-E; SOAH Docket No. 582-11-9415**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script, reading "Sarah G. Ramos".

SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

SGR:cm
Enclosures
cc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: OLD TYMER ENTERPRISES INC

SOAH DOCKET NUMBER: 582-11-9415

REFERRING AGENCY CASE: 2011-2253-PWS-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ SARAH G. RAMOS**

REPRESENTATIVE / ADDRESS

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OLD TYMER ENTERPRISES, INC.

**SOAH DOCKET NO. 582-11-9415
TCEQ DOCKET NO. 2010-1405-PWS-E**

**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Petitioner**

V.

**OLD TYMER ENTERPRISES, INC.,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) brought this enforcement action against Old Tymer Enterprises, Inc. (Respondent). The ED alleged that Respondent owns and operates a public water system (PWS) and failed to collect routine distribution water samples for coliform analysis; provide a public notification for the failure to collect the samples; and pay public health service fees, including late fees. The ED requests that the Commission require Respondent to implement corrective measures and impose a \$7,370 administrative penalty. Of the penalty amount requested, \$4,550 is based on Respondent's compliance history, violations that occurred under the prior ownership of the PWS.

Respondent argued that the Commission's 2002 Penalty Policy is unconstitutional in that it allows for penalty enhancements based on actions that took place under prior ownership. Respondent did not have the due process protections of being informed of the earlier allegations against the PWS and having an opportunity to contest those allegations. Therefore, Respondent asserts, it should not be held accountable for violations that occurred prior to when Respondent acquired the PWS.

In this Proposal for Decision, the Administrative Law Judge (ALJ) finds that the evidence supports the ED's allegations and penalty enhancements are appropriate. Therefore, the ALJ recommends that the Commission find the violations occurred, assess an administrative penalty of \$7,370, and require Respondent to take corrective action.

II. PROCEDURAL HISTORY

The preliminary hearing was set for September 29, 2011. On September 28, 2011, the ED and Respondent filed a joint motion to waive appearance at the preliminary hearing and to admit certain jurisdictional documents. The joint motion was granted and the documents were admitted without objection. Jurisdiction was established, and the parties' proposed procedural schedule was adopted. Other undisputed procedural facts are addressed only in the Findings of Fact in the attached Proposed Order.

ALJ Sarah G. Ramos convened the hearing on the merits on May 8, 2012, at the State Office of Administrative Hearings in Austin, Texas. Staff attorneys Jennifer Cook and Stephanie Frazee represented the ED, and attorneys Bradford E. Bullock and Arturo D. Rodriguez, Jr., represented Respondent. The record closed on June 20, 2012, after the parties filed briefs regarding the constitutionality of the enhancement amounts.

III. DISCUSSION

A. Overview

Respondent owns and operates a convenience store with a PWS located at 28295 Interstate Highway 10 West, Boerne, Bexar County, Texas (the Facility). The Facility provides water for human consumption, has approximately three service connections, and serves at least 25 people per day for at least 60 days per year. As such, the Facility is a PWS. Respondent

purchased the Facility from AMK Enterprises, Inc. (AMK) in June or July 2009.¹ Respondent has operated the Facility at least since August 1, 2009, and Amarjit Jolly is the person responsible for the Facility's day-to-day business operations and oversight.

During a record review conducted on July 1, 2010, a TCEQ investigator documented that Respondent failed to collect routine distribution water samples for coliform analysis at the Facility for August 2009 through May 2010 and failed to provide a public notification for the failure to collect routine distribution coliform samples from August 2009 through April 2010. Also, a TCEQ staff member determined that Respondent failed to pay public health service fees, including late fees.

B. Public Water System

Commission rule 30 TAC § 209.38(66) defines a PWS as one that provides water for human consumption through pipes or other constructed conveyances and serves at least 25 individuals at least 60 days out of the year. The definition of "human consumption" includes uses by humans in which water can be ingested into or absorbed by the human body. Examples of these uses include, but are not limited to drinking, cooking, brushing teeth, bathing, washing hands, washing dishes, and preparing foods.²

1. Monitoring

The owner or manager of a PWS that supplies water to fewer than 25,000 persons must submit to the Commission a water specimen for bacteriological analysis.³ The bacteriological samples are tested for total coliform, fecal coliform, *E. coli*, or other fecal indicator organisms.⁴

¹ Commission Order No. issued October 10, 2011.

² 30 Tex. Admin. Code (TAC) § 290.38(32).

³ Tex. Health & Safety Code § 341.033(d).

⁴ 30 TAC § 290.109(c).

The ED requires that a PWS take samples based on the population served by the system, calculated by the maximum number of persons served on any given day during the month.⁵ Because Respondent operates a PWS with a population from 1 to 1,000 served, the minimum sampling frequency is one sample per month.⁶ A PWS that fails to provide the required number of coliform samples commits a monitoring violation.⁷

2. Reporting

A PWS that has failed to comply with a coliform monitoring requirement must report the monitoring violation to the ED and provide public notification of its failure to monitor.⁸ Public notification must be issued within three months of the violation and is to be provided to the persons served by the system either by direct delivery of the notice or by continuously posting the notice in conspicuous places within the area served by the system.⁹ Notice must also be given by newspaper publication, delivery of copies to apartment owners or large employers for distribution to affected persons, posted in public places or the internet, or delivery to community organizations.¹⁰

The Commission is authorized under Tex. Health & Safety Code § 341.049 to assess administrative penalties against one that fails to comply with the monitoring requirements. That section lists factors that the Commission should consider in calculating an administrative penalty. The factors include consideration of the nature, circumstances, extent, duration, and gravity of the prohibited act, or the hazard, or potential hazard, created to the health or safety of the public.

⁵ 30 TAC § 290.109(c)(2)(A)(i).

⁶ 30 TAC § 290.109(c)(2)(A)(iii).

⁷ 30 TAC § 290.109(f)(5).

⁸ 30 TAC § 290.122(c).

⁹ 30 TAC § 290.122(c)(2)(A).

¹⁰ 30 TAC § 290.122(c)(2)(B).

With regards to the alleged violator, the factors include the following:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

The penalty may be not less than \$50 nor more than \$1,000 per day of violation.¹¹

C. ED's Evidence

1. Donald Clyde White

Mr. White works at TCEQ's San Antonio Regional Office as an Environmental Investigator V in the Public Water Supply Department of the Water Program. He holds a bachelor's degree in environmental sciences with a minor in chemistry and has significant post-graduation training in environmental issues. He had been a TCEQ staff member for 17 years and has completed about 1,100 investigations.

Mr. White was asked to investigate the Facility. Three days before going there, Mr. White contacted Mr. Jolly to tell him about the site visit and to ask Mr. Jolly to have monitoring records ready for Mr. White's review. Mr. Jolly informed Mr. White that he would make arrangements for a company representative to be present if Mr. Jolly was unable to be there. Mr. White went to the Facility on March 29, 2012. Respondent's general manger, Don Price, accompanied Mr. White during his investigation. Mr. Price told Mr. White that

¹¹ Tex. Health & Safety Code § 341.049.

Respondent had operated the Facility since 2009, but he also admitted Respondent had no records of coliform testing.

Respondent's property is a row of three businesses connected by shared walls and a single roof.¹² Mr. White determined that the Facility had three water connections to a well. The first connection was to a dry cleaning distributor. Clothes were not being cleaned on site but were collected, sent out, and returned to the location. Two employees worked at the dry cleaners and used the restroom that was connected to the water supply, but water was not offered to the general public from that location. The next business was a liquor store, and the well was located inside the store. The third connection was for Respondent's combined convenience store, restaurant, and gas station which operate from 6:00 a.m. until 11:00 p.m. seven days a week.

Inside the convenience store, Mr. White saw food being prepared and sold for human consumption. The kitchen area had hand and dishwashing sinks. Containers and utensils used to prepare food were washed in the sinks. Soda fountain dispensers, slushy machines, and coffee makers used water from the well for beverages. A large ice machine provided ice for the fountain drinks. Respondent also had public restrooms with hand washing sinks.¹³

On that first visit on March 29, 2012, Mr. White saw 37 people with access to water from the PWS – one employee at the dry cleaners, four employees at the convenience store and 32 customers who purchased food or drinks. On April 13, 2012, Mr. White returned to the location where he observed the same types of human consumption.

Mr. White's photographs of Respondent's business are included in his report at ED Exhibit 2. They show:

¹² Mr. White's diagrammed the locations of the well, chlorination, pressure tank and distribution system at ED Ex. 2 at 14.

¹³ Mr. White went only into the men's restroom but assumed the women's restroom also had a hand washing sink.

Depicted	Page
five customers and two employees	7
soda fountain machines	8
entrance to the convenience store restrooms	9
food that was being served	10
ice machine used for soda fountain drinks	11
sinks and cooking utensils	12
liquor storefront, and to the left, the dry cleaning business	13

Mr. White noted that PWS operators must submit periodic operating reports and keep at least five years of microbiological results organized and available for review during an inspection.¹⁴ The monitoring requirement is essential to protect the public, he said. If a PWS is not monitored, the public's health can be at risk for illness, including cholera.

2. Sally Paramo

Ms. Paramo, a TCEQ Natural Resources Specialist, has processed over 200 enforcement cases. She conducted a record review of Respondent's PWS for compliance with monitoring requirements. According to Ms. Paramo, a PWS must adhere to the following protocol:

- a water sample is collected by the water system;
- the sample is submitted by the water system to a TCEQ-certified laboratory;
- the water system submits sample collection information to the lab;
- the lab analyzes the sample for bacteria;
- the lab reports the results to TCEQ and the water system; and
- TCEQ enters the information into the Safe Drinking Water Information Services database.

¹⁴ See 30 TAC § 290.46(f)(3)(D).

Ms. Paramo determined that from August 2009 through May 2010, Respondent failed to submit monthly bacteriological samples, and from August 2009 through April 2010, Respondent failed to post public notice regarding the failure to take samples.¹⁵ Until October 7, 2011, Ms. Paramo sent notices of violation to AMK at an address that was not the same as Respondent's address.

Asked why she sent notices to AMK, Ms. Paramo said she used the information from the Secretary of State's website to determine who was responsible for the Facility. She also said PWS owners are required to update their information when there is a change in ownership. Further, Ms. Paramo noted that the notice of enforcement action was sent to AMK on August 4, 2010, but Respondent filed its answer to the notice of enforcement on March 29, 2011, and at least by that date, knew what violations were alleged.

Ms. Paramo testified that, as of March 31, 2012, TCEQ had received no sampling information and no documentation indicating that public notice had been posted. Therefore, according to Ms. Paramo, sampling violations were still occurring.¹⁶

3. Stephen Thompson

Mr. Thompson has worked as a TCEQ enforcement coordinator for more than four years. He testified that Respondent failed to pay public health service fees for fiscal year 2010.¹⁷ Fees are assessed on January 1 to cover the calendar year that follows.

Mr. Thompson also calculated the penalty for this case and used the environmental and human health matrix to do so. He said his method of calculating the penalty was similar to how penalties have been calculated in other cases. The total proposed administrative penalty of \$7,370 was calculated as follows:

¹⁵ ED Ex. 1.

¹⁶ ED Ex. 11.

¹⁷ ED Ex. 6.

- Respondent's failure to monitor had the potential, but did not actually, cause major harm to human health, which resulted in a reduction of the base penalty to \$250 per event (\$1,000 x 25%);
- Respondent failed to perform the required monitoring for 10 different months (from June 2008 through January 2010), resulting in a \$2,500 base penalty (\$250 x 10 events);
- Good faith efforts to comply were not applicable because Respondent did not provide retroactive monthly samples;
- The Facility had two prior orders against it when AMK owned the property, and Mr. Thompson included a 50% enhancement to the base penalty for the prior orders;
- The Facility had 26 similar notices of violation (NOVs), resulting in a 130% enhancement to the base penalty and one dissimilar NOV, resulting in a 2% enhancement to the base penalty;
- The amount of \$320 was added to the base penalty to account for what it would have cost to comply with the monitoring requirement;
- Respondent's total adjusted penalty was \$7,370; and
- Justice does not require a further penalty adjustment.

Mr. Thompson did not recommend a penalty for the failure to pay the health service fee, but he did recommend that Respondent be ordered to pay the fee, late fees, and associated penalties and interest as part of the corrective action.

Regarding the enhancement for orders issued when AMK owned the property, Mr. Thompson testified that prior violations are tracked according to the Facility, not the owner, since compliance history relates to the site. Under the Penalty Policy, the prior orders support a 50% enhancement, he stated.

Mr. Thompson also recommended the corrective actions of requiring Respondent to conduct routine monitoring and implement procedures to ensure that required public notice is

given when samples are not taken.¹⁸ According to Mr. Thompson, these requirements would be considered satisfied upon six consecutive months of proper compliance monitoring and reporting.

D. ED's Arguments

The ED argued that, with three connections and a significant number of people served by the system each day, Respondent was required to monitor its PWS. Respondent was responsible for the Facility beginning in August 2009, and, therefore, Respondent was responsible for the omissions proven by the evidence.

The ED noted that Respondent did not timely update ownership information with the TCEQ, and since 2007, TCEQ's records have shown three connections and a population of 200 for Respondent's PWS.¹⁹ In Respondent's discovery responses, he admitted that as of 2009, there was a restaurant and convenience store at the site. Furthermore, the ED asserted that Respondent has been responsible for the Facility since August 2009 and completely failed to monitor, post public notice, and pay health service fees. The Penalty Policy provides that a Respondent's compliance history is determined based on five years of compliance history.²⁰ When there is a change in ownership, the compliance history includes only the site under review.²¹ Respondent had a duty to properly investigate the site before purchasing it and to become informed about any environmental violations for which Respondent could become responsible upon purchasing the property. Finally, the ED contended that since Respondent failed to exercise due diligence, the proposed penalty is appropriate.

¹⁸ The ED's proposed corrective actions are listed at ED Ex. A, p. 3.

¹⁹ ED Exs. 9 and 11.

²⁰ *Citing* 30 TAC § 60.1.

²¹ 30 TAC § 60.1(d).

E. Respondent's Arguments

Respondent argued that the ED failed to prove the Facility was a PWS in 2009 or 2010. In Respondent view, it was not until Mr. White's site visit that the ED definitely determined Respondent is a PWS.

Moreover, Respondent argued that the proposed penalty should not be enhanced since Respondent had no opportunity to contest the prior allegations. In Respondent's view, the enhancement portion of the Penalty Policy is unconstitutional as applied to Respondent because it had no relationship to the property in question at the time of the earlier alleged violations, thus denying Respondent its due process rights by assessing fines against it for acts that it neither committed nor had the ability to contest, prevent, or mitigate. Imposing a fine against Respondent under these circumstances is unconstitutional and is all the more egregious since the enhancement amount even exceeds the underlying penalty amount.

IV. ANALYSIS

The evidence established that Respondent owns and operates a PWS and did not conduct the required bacteriological monitoring for its water system. Respondent did not collect routine distribution water samples from its water system for coliform analysis during the months of August 2009 through May 2010 and did not provide public notice to its customers of these failures from August 2009 through April 2010.

Because public health is at risk when there is no sampling, Respondent must be held to a rigorous standard of compliance; sampling must be uniformly collected, tested, and reported. Further, when a PWS fails to monitor, the public must be notified so that precautions can be implemented. Respondent did not dispute the ED's evidence regarding failure to monitor and post notice. Instead, Respondent argued that there was no evidence of a PWS at the site until Mr. White's site visit in 2012. Respondent also argued that Respondent was not responsible for

monitoring in 2009 and 2010. However, Respondent admitted in his discovery responses that he operated the system from August 1, 2009 to the present. Moreover, the PWS database showed that Respondent had three connections and met the definition serving at least 25 individuals at least 60 days out of the year.²² Respondent has presented no evidence to controvert Staff's allegations regarding monitoring and notice, and Staff met its burden of proof on these issues. In addition, Staff proved that Respondent failed to pay its 2010 health service fee.

As for Respondent's argument that enhancement provisions in the Penalty Policy are unconstitutional, the ALJ agrees with Staff that the enhancements do not deprive Respondent of property without due process. The water connections were on the site when Respondent became responsible for the property. Mr. White clearly observed the well on his site visit, and a person who owned the property should have realized that the well provided water for the convenience store and restrooms. Any reasonable person would have recognized that the water supply was within the property itself and not provided by an outside source. Additionally, a reasonable purchaser would have investigated whether the site was in compliance with environmental regulations or had any prior actions against it.

The Health & Safety Code allows for imposition of a penalty of up to \$1,000 per violation. Mr. Thompson testified that he calculated the proposed penalty in manner that is similar to how penalties have been calculated in other cases. The factors he considered include those listed in Health & Safety Code § 341.049. The ALJ finds that his method of enhancing the penalty was reasonable in light of the fact that the Health & Safety Code provides for consideration of the history and extent of previous violations. Therefore, the ALJ recommends that an administrative penalty of \$7,370 be assessed against Respondent and Respondent be ordered to comply with the corrective measures listed in the Proposed Order.

²² 30 TAC § 209.38(66); *see* ED Ex. 9.

V. SUMMARY

The evidence established that Respondent failed to collect routine distribution water samples from its PWS for coliform analysis during the months of August 2009 through May 2010 and did not provide public notice to its customers during the month following each of these failures to monitor, at least through April 2010. As a result, Respondent violated Tex. Health and Safety Code § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A) and 290.122(c)(2)(B). The evidence also established that the \$7,370 administrative penalty and the corrective action requested by the ED are appropriate.

Therefore, the ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law in the Proposed Order, assess a \$7,370 administrative penalty against Respondent, and require Respondent to conduct required routine bacteriological sampling of its water supply, to implement procedures to ensure that required public notice is given when samples are not taken, and to pay the required public health service fee and related penalties and interest.

SIGNED August 17, 2012.



**SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**Assessing Administrative Penalties against
and Requiring Corrective Action by
OLD TYMER ENTERPRISES, INC.
TCEQ DOCKET NO. 2010-1405-PWS-E
SOAH DOCKET NO. 582-11-9415**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action by Old Tymer Enterprises, Inc. (Respondent). A Proposal for Decision (PFD) was presented by Sarah G. Ramos, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the EDPRP on May 8, 2012.

After considering the PFD, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. Respondent owns and operates a convenience store with a public water system (PWS) located at 28295 Interstate Highway 10 West, Boerne, Bexar County, Texas (the Facility).
2. The Facility has a well, provides water for human consumption, has approximately three service connections, and serves at least 25 people per day for at least 60 days per year.
3. Respondent purchased the Facility from AMK Enterprises, Inc. (AMK) in June or July 2009.

4. Respondent has operated the Facility at least since August 1, 2009, and Amarjit Jolly is the person responsible for the Facility's day-to-day business operations and oversight.
5. Respondent failed to collect routine distribution water samples for coliform analysis at the Facility for August 2009 through May 2010 and failed to provide a public notification for the failure to collect routine distribution coliform samples from August 2009 through April 2010.
6. Respondent failed to pay public health service fees, including late fees, for 2010.
7. On September 15, 2011, the Executive Director (ED) filed the EDPRP in accordance with Tex. Health & Safety Code § 341.049(c), alleging that Respondent failed to collect routine distribution samples for coliform analysis and failed to provide public notice of the failure to sample for the months of August 2009 through May 2010 and failed to provide a public notification for the failure to collect routine distribution coliform samples for the months of August 2009 through April 2010, in violation of Tex. Health & Safety Code § 341.033(d) and 30 Tex. Admin. Code (TAC) §§ 290.109(c)(2)(A) and 290.122(c)(2)(B).
8. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$7,370 against Respondent and requiring corrective action by Respondent.
9. The total proposed administrative penalty of \$7,370 was calculated as follows:
 - a. Respondent's failure to monitor had the potential but did not actually cause major harm to human health, which resulted in a reduction of the base penalty to \$250 per event (\$1,000 x 25%);
 - b. Respondent failed to perform required monitoring for 10 different months (from June 2008 through January 2010), resulting in a \$2,500 base penalty (\$250 x 10 events);

- c. Good faith efforts to comply were not applicable because Respondent did not provide retroactive monthly samples;
 - d. The Facility had two prior orders against it within the past five years, resulting in a 50% enhancement to the base penalty;
 - e. The Facility had 26 similar notices of violation (NOVs), resulting in a 130% enhancement to the base penalty and one dissimilar NOV, resulting in a 2% enhancement to the base penalty;
 - f. The amount of \$320 was added to the base penalty to account for what it would have cost to comply with the monitoring requirement;
 - g. Respondent's total adjusted penalty was \$7,370; and
 - h. Justice does not require a further penalty adjustment.
10. The ED recommended that Respondent be required to implement corrective measures to comply with applicable coliform monitoring requirements; to implement procedures to ensure that all necessary public notifications are provided in a timely manner to customers of the water system; to pay the 2010 public health service fees with applicable penalties and interest; and to submit written certification and supporting documentation to demonstrate compliance.
11. On February 15, 2011, the ED mailed a copy of the EDPRP to Respondent at its last address of record with the Commission.
12. On March 29, 2011, Respondent requested a hearing on the ED's allegations.
13. On January 21, 2011, the ED asked the Commission's Chief Clerk to refer this case to SOAH for hearing, which she did.

14. On August 12, 2011, the Chief Clerk mailed a notice of hearing to Respondent, the ED, and the Office of Public Interest Counsel.
15. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
16. On April 27, 2012, the ED mailed a copy of the Second Amended EDPRP to Respondent at its address of record with the Commission.
17. On May 8, 2012, ALJ Ramos convened a hearing at the SOAH hearing facilities, William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. Staff attorneys Jennifer Cook and Stephanie Frazee represented the ED, and attorneys Bradford E. Bullock and Arturo D. Rodriguez, Jr., represented Respondent. The Office of Public Interest Counsel did not participate in the hearing. The record closed on June 20, 2012.
18. An administrative penalty of \$7,370 is reasonable and takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Tex. Health & Safety § 341.049 and in the Commission's 2002 Penalty Policy.
19. The corrective actions required are reasonable.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Tex. Water Code § 5.013 and Tex. Health & Safety Code § 341.049.

2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a PFD with Findings of Fact and Conclusions of Law, pursuant to Tex. Gov't Code Ch. 2003.
3. Under Tex. Health & Safety Code § 341.049, the Commission may assess an administrative penalty against a person who violates a provision of Subchapter C of the Texas Health and Safety Code or a rule or order adopted thereunder.
4. Under Tex. Health & Safety Code § 341.049, the penalty may not exceed \$1,000 per violation, and each day of a continuing violation may be considered a separate violation.
5. As required by Tex. Health & Safety Code § 341.049(d) and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties proposed therein.
6. As required by Tex Gov't Code §§ 2001.051 and 2001.052; Tex. Health & Safety Code § 341.049; 1 TAC §§ 155.401; and 30 TAC §§ 1.11 and 39.25, Respondent was notified of the hearing on the alleged violations and the proposed penalties.
7. Commission rule 30 TAC § 290.38(66) defines a PWS as a system for providing the public water for human consumption through pipes or other conveyances. The system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year.
8. The Facility is a PWS.
9. Tex. Health & Safety Code § 341.033(d) provides that the owner or manager of a PWS that furnishes drinking water to less than 25,000 people shall submit to the Commission during each month of the system's operation at least one specimen of water taken from the supply for bacteriological analysis.

10. Tex. Health & Safety Code § 341.031 authorizes the Commission to adopt and enforce rules to implement the federal Safe Drinking Water Act.
11. Commission rule 30TAC § 290.109(c)(2) requires a public water system serving a population of less than 1,000 to perform routine distribution coliform sampling at least once per month.
12. Commission rule 30 TAC § 290.122(c)(2)(B) requires the operator of a public water system who fails to perform required water monitoring to notify persons served by the system of the failure to perform the required monitoring in a manner reasonably calculated to reach such persons for at least seven days or as long as the violation exists.
13. Respondent violated Tex. Health & Safety Code § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A) and 290.122(c)(2)(B).
14. In determining the amount of an administrative penalty, Tex. Health & Safety Code § 341.049(b) requires the Commission to consider several factors including:
 - The nature, circumstances, extent, duration, and gravity of the prohibited acts;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
15. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
16. Based on consideration of the above Findings of Fact, the factors set out in Tex. Health & Safety Code § 341.049(b), and the Commission's Penalty Policy, the ED correctly calculated

the penalties for the alleged violations and a total administrative penalty of \$7,370 is justified and should be assessed against Respondent.

17. Within 10 days after the effective date of this Order, Respondent will begin complying with applicable coliform monitoring requirements by collecting routine coliform distribution samples and providing water that meets the provisions regarding microbial contaminants, in accordance with 30 TAC § 290.109. This provision will be satisfied upon six consecutive months of compliance monitoring and reporting.
18. Within 10 days after the effective date of this Order, Respondent will implement procedures to ensure that all necessary public notifications are provided to the customers of the Facility in a timely manner, in accordance with 30 TAC § 290.122.
19. Respondent will submit payment for all outstanding fees, interest, and penalties for TCEQ Financial Administration Account No. 90150363.
20. Within 195 days after the effective date of this Commission Order, Respondent shall submit written certification and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with the Order.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Respondent is assessed an administrative penalty of \$7,370 for its violations of Tex. Health & Safety Code § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A) and 290.122(c)(2)(B). The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that were not raised in this case. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." The payment shall be sent with the notation "Old Tymer Enterprises, Inc., Financial Administration Account No. 90150363" to:

Financial Administration Division, Revenues Section
Attention: Cashiers Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 10 days after the effective date of this Order, Respondent will begin complying with applicable coliform monitoring requirements by collecting routine coliform distribution samples and providing water that meets the provisions regarding microbial contaminants, in accordance with 30 TAC § 290.109. This provision will be satisfied upon six consecutive months of compliance monitoring and reporting.
3. Within 10 days after the effective date of this Order, Respondent will implement procedures to ensure that all necessary public notifications are provided to the customers of the Facility in a timely manner, in accordance with 30 TAC § 290.122.

4. Respondent will submit payment for all outstanding fees, interest, and penalties for TCEQ Financial Administration Account No. 90150363. The payment shall be sent with the notation "Old Tymer Enterprises, Inc., Financial Administration Account No. 90150363" to:

Financial Administration Division, Revenues Section
Attention: Cashiers Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

5. Within 195 days after the effective date of this Commission Order, Respondent shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions 1 through 4. The certification shall be notarized by a Texas notary public and include the following certification language:

I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitted false information, including the possibility of fines and imprisonment for knowing violations.

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

A copy should be sent to:

Public Drinking Water Section Manger
San Antonio Regional Office

14250 Judson Road
San Antonio, Texas 78233-4480

6. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
7. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
8. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Tex. Gov't Code § 2001.144.
9. As required by Tex. Health & Safety Code Ann. § 341.049(h), the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
10. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Bryan W. Shaw, Ph.D., Chairman
For the Commission